

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 29, 2014 at Knoxville

DERRICK RICE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 08-07884 J. Robert Carter, Jr., Judge

No. W2013-00774-CCA-MR3-PC - Filed February 20, 2014

The petitioner, Derrick Rice, appeals the Shelby County Criminal Court's summary dismissal of his petition for post-conviction relief as untimely filed. Upon our review, we reverse the decision of the post-conviction court and remand for proceedings consistent with the Post-Conviction Procedure Act.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which NORMA MCGEE OGLE and JEFFREY S. BIVINS, JJ., joined.

Derrick Rice, Whiteville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; and Sophia S. Lee, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

A Shelby County Criminal Court jury convicted the petitioner of first degree premeditated murder and attempted first degree premeditated murder. The trial court sentenced the petitioner to life imprisonment and 15 years' incarceration, respectively, to be served concurrently. This court affirmed the judgments on direct appeal, *see State v. Derrick Rice*, No. W2010-02421-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Jackson, Nov. 9, 2011), and our supreme court denied the petitioner's application for permission to appeal on March 7, 2012.

On January 2, 2013, the petitioner filed a pro se petition for post-conviction relief and filed three amended petitions. On January 8, 2013, the post-conviction court denied the petition for post-conviction relief, finding that it was untimely filed because it was

filed more than one year after this court's November 9, 2011 decision.

On May 7, 2013, this court upon the petitioner's motion waived the timely filing of the petitioner's notice of appeal in the interest of justice, stating that the petitioner had been unable to file a timely notice of appeal because the prison in which he was housed had been placed on "lock down" during the applicable time period. This court then ordered that the petitioner file a notice of appeal in the trial court within ten days, and on May 13, 2013, the petitioner filed his notice of appeal.

On appeal, the petitioner argues that the post-conviction court erred by dismissing as untimely his petition for post-conviction relief, and the State agrees.

"[A] person in custody . . . must petition for post-conviction relief . . . within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken." T.C.A. § 40-30-102(a). In the instant case, this court's November 9, 2011 order affirming the judgment of the trial court would have resulted in the petitioner's January 2, 2013 petition being untimely filed if the petitioner's appeal had ended there. However, because the petitioner filed an application for permission to appeal to our supreme court, which application was denied on March 7, 2012, the petitioner's January 2, 2013 petition for post-conviction relief was filed within one year of the highest state appellate court's final action and, thus, was timely filed. *See id.*

It appears from the record that the petitioner failed to include in his petition for post-conviction relief the fact that the supreme court had denied his application for permission to appeal on March 7, 2012, which likely explains the post-conviction court's reliance on this court's November 9, 2011 decision and subsequent dismissal of the petition.

Because the petition for post-conviction relief was timely filed, the post-conviction court erred by summarily dismissing the petition. Accordingly, we reverse the decision of the post-conviction court and remand for proceedings in accordance with the Post-Conviction Procedure Act.

JAMES CURWOOD WITT, JR., JUDGE